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No. 01-817

Supreme Court, U.S.
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In The

Supreme Court of the United States

DINO'S VICTORY ROADHOUSE, INC.
and DEAN GETTLESON,

Petitioners,

v.

CITY OF LOS ANGELES,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal Second Appellate District

BRIEF IN OPPOSITION OF RESPONDENT CITY OF LOS ANGELES

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PARTIES TO THE PROCEEDINGS

This Brief in Opposition to the Petition for a Writ of Certiorari is submitted on behalf of respondent, City of Los Angeles. The City of Los Angeles (hereinafter "City") respectfully requests that this Court deny the petition for writ of certiorari, seeking review of an unpublished decision of the California Court of Appeal, 2nd Appellate District.

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MEMORANDUM OPPOSING CERTIORARI

1. This Case Is Not Suitable for Supreme Court Review Because the Petitioners Have Not Suffered an Injury.

The purpose of this Brief in Opposition to the Petition for Writ of Certiorari is to correct the impression that the City has precluded the petitioners, Dino's Victory Roadhouse, Inc. and Dean Gettleson ("petitioners") from operating an adult entertainment business at 18484 Oxnard Street in the City of Los Angeles during the pendency of the City's administrative process and subsequent judicial proceedings. In fact, the Court of Appeal decision recognizes that dancers at petitioners' bar began exposing their breasts in 1998. (Appendix to Petition 6a).

The petitioners state that they have "yet to receive the permit (exception) which the Municipal Code requires Petitioners to have in order to engage in expressive activity of a certain nature, *i.e.*, adult entertainment." (Petition 20). This statement implies that the petitioners are not in fact operating an adult entertainment business at the premises. However, the petitioners have been and continue to operate an adult business on the premises. Therefore, this case does not raise the issue of whether the prompt judicial review requirement, announced by this Court in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), requires a prompt judicial determination on the merits or merely prompt access to court review when a regulatory scheme operates as a prior restraint on the exercise of First Amendment rights.

However, this case is very similar to *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001) where

this Court dismissed the writ of certiorari because the issue of prompt judicial review was not genuinely presented. In *City News,* this Court was asked to "resolve a conflict among the circuits concerning whether the guarantee of prompt judicial review that must accompany [an adult business] licensing scheme means a prompt judicial determination or simply the right to promptly file for judicial review." *Id.* at 282, *citing* the Pet. for Cert. 13. The petitioner in *City News* applied for a renewal of its adult business license. Waukesha denied the application finding that City News had violated a Waukesha Ordinance by allowing minors to loiter on the premises, failing to maintain an unobstructed view of booths in the store, and allowing patrons to engage in sexual activity inside the booths. *Id.* This Court granted certiorari from the Wisconsin Court of Appeals to address the procedural requirements necessary to guard against unconstitutional prior restraint of expression.

In dismissing the writ of certiorari in *City News,* this Court held that the requirement of prompt judicial review was not accurately reflective of City News' grievance because City News was not seeking an end to the status quo of silence, but rather, seeking to maintain the status quo of speech. *Id.* at 285. Because City News was already licensed to conduct an adult business, the Court ruled that City News' concern was not one of prior restraint.

Like the petitioners in *City News,* the petitioners have failed to allege the actual existence of a prior restraint. There is nothing in the petition or record which demonstrates that the City has prevented the petitioners' presentation of adult dancing. The petitioners are not

seeking an end to the status quo of silence, but rather seeking to maintain the status quo of speech.

Furthermore, the petitioners never argued in the proceedings before the Superior Court or the California Court of Appeal that they were being prevented from presenting adult entertainment. Nor does the record demonstrate that the petitioners ever sought an injunction to prevent the City from enforcing any order limiting the presentation of adult entertainment. Code of Civil Procedure § 1094.5(g) clearly authorizes the court to grant a stay of the administrative order or decision. Their failure to seek such relief precludes this Court's review, and the petition for writ of certiorari should be denied.

2. The Petitioners' Reliance on *Freedman v. Maryland* Is Without Merit.

In an attempt to secure Supreme Court review, however, the petitioners rely on *Freedman v. Maryland*, 380 U.S. 51 (1965) and its progeny to assert that the First Amendment requires a prompt judicial decision when a municipality requires a permit for expressive activity. Yet, in each of the cases cited by petitioners, this Court addressed the issue of whether a municipality's licensing of protected First Amendment activity operated as a prior restraint, thereby necessitating the procedural safeguards announced in *Freedman* and *FW/PBS*. Here, the petitioners admittedly could not comply with the City's adult use ordinance due to its proximity to a residential zone, and therefore, made no challenge to the constitutionality of the City's ordinance. (Appendix to Petition 6a). Rather, the petitioners sought relief from the adult use ordinance

pursuant to Los Angeles Municipal Code § 12.22A(20) which operates to provide the "reasonable alternative avenues of expression" requisite to a constitutionally valid zoning law for protected matter. (Appendix to Petition 5a, 6a, *citing, Topanga Press, Inc. v. City of Los Angeles,* 989 F.2d 1524 (9th Cir. 1993)). The licensing schemes at issue in *Freedman* have no bearing on the instant action and, as such, certiorari should be denied.

In *Freedman,* a state law required that every motion picture film be submitted to a Board of Censors prior to being shown anywhere in the state. *Freedman, supra,* 380 U.S. at 51, n.1. The statute punished the exhibitor of a film not submitted "and approved and licensed by the Maryland State Board of Censors." *Id.* This Court characterized the ordinance as an invalid prior restraint which could only withstand constitutional scrutiny if it provided procedural safeguards designed to obviate the dangers of a censorship provision. *Id.* at 58. Because the motion picture licensing scheme failed to provide such safeguards, this Court reversed the conviction.

Similarly, in *FW/PBS, Inc. v. Dallas, supra,* an adult business sought review of a Dallas ordinance which regulated sexually oriented businesses through a scheme incorporating licensing, zoning, and inspections. In holding the ordinance unconstitutional, this Court ruled the Dallas licensing scheme operated as an unconstitutional prior restraint because it failed to set a time limit within which the licensing authority must issue the license. In so holding, this Court noted that the core policy consideration underlying its holding is to prevent the undue delay which might result in the unconstitutional suppression of protected speech.

The concerns necessitating the procedural safeguards at issue in *Freedman* and *FW/PBS* were not at issue in this case as presented to the lower courts. The Petitioners have failed to demonstrate that they have been subjected to an invalid prior restraint.

CONCLUSION

As stated above, there is no compelling reason for this Court to grant a writ of certiorari in this case. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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